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Motions

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 LEEWARD CONSTRUCTION COMPANY, Ltd.,

4 Petitioner,

5 v.

12 Civ. 6280 LAK

6 MANIPAL EDUCATION AMERICAS, LLC, et al.,

7 Defendants.

8 -----x

9 December 17, 2012
2:40 p.m.

10
11
12 Before:

13 HON. LEWIS A. KAPLAN,

14 District Judge

15
16 APPEARANCES

17 LEWIS & GREER, PC

18 Attorneys for plaintiffs

19 BY: VERONICA ANN McMILLAN, Esq.

Of counsel

20 SILLS, CUMMIS et al.

Attorneys for respondent Manipal Education

21 BY: JONATHAN SCOTT JEMISON, Esq.

22 Of counsel

23 SNR DENTON US, LLP

Attorneys for respondent American University

24 BY: KATHERINE MARGUERITE LIEB, Esq

25 Of counsel

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1 (In open court)

2 (Case called)

3 THE COURT: Good afternoon.

4 MS. McMILLAN: Good afternoon, your Honor. My name is
5 Veronica McMillan. I am here from the law firm of Lewis &
6 Greer on behalf of Leeward Construction Company, limited.

7 Today we are seeking under a petition to confirm an
8 arbitration award that was awarded in favor for the most part
9 in favor of Leeward Construction, in an arbitration that was
10 held in Puerto Rico in March of this year, March 15th, and
11 concerns a construction project performed in Antigua in the
12 period of 2008 to 2009.

13 In response to the petition to confirm, the
14 respondents have cross-moved to dismiss the petition for
15 failure to state a claim against Manipal as well as for forum
16 non conveniens.

17 THE COURT: The total amount of the award is around a
18 million dollars?

19 MS. McMILLAN: At this point it is because interest
20 continues to accrue on the award, but the base amount as of
21 August 14th --

22 THE COURT: Have the legal fees yet exceeded it?

23 MS. McMILLAN: Not that I am aware, your Honor.

24 THE COURT: Judging by the weight of these papers,
25 they're close.

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1 MS. McMILLAN: We would submit that the forum is an
2 appropriate one. The petitioners choice is entitled to a high
3 level of deference, as I am sure the court is aware of the
4 three point standard under which these motions are considered,
5 the first being level of deference awarded to the petitioner's
6 choice of forum.

7 THE COURT: You don't quite get a high level of
8 deference, do you? You're not a U.S. plaintiff.

9 MS. McMILLAN: We are not, but we have a fairly strong
10 belief based on documentation we provided to the court that AUA
11 and certainly its parent organization Manipal has financial
12 assets in the jurisdiction, and as this Court held in September
13 of this year, that is an appropriate basis upon which to file a
14 petition to confirm inside the jurisdiction in the Sonera case.

15 So Manipal is also a New York limited liability
16 corporation and it has been the parent organization of AUA
17 since December of 2007.

18 THE COURT: I have been curious about what exactly
19 that means. Is AUA a corporation?

20 MS. McMILLAN: As I understand it, your Honor, AUA is
21 some sort of corporate format that arises out of Antigua.
22 They're actually an Antiguan entity. And Manipal, a New York
23 limited liability company, is the hundred percent parent owner
24 of the corporation.

25 THE COURT: If that's what it is?

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1 MS. McMILLAN: Right, if it is, in fact, a
2 corporation.

3 THE COURT: Go ahead.

4 MS. McMILLAN: Your Honor, in addition to its parent
5 company being a New York corporation, AUA does conduct
6 operations in New York. The web site has information regarding
7 its operations including the bursar admissions and financial
8 aid offices here in New York, contacts in online applications
9 go through New York and fees are paid in U.S. dollars. In
10 fact, as part of the reimbursement for the hearing room costs
11 this past March, our firm was reimbursed by Manipal through a
12 check drawn on a New York Bank.

13 Throughout the conduct of the project, I would say
14 probably exclusively all the Manipal payments or certainly the
15 majority of them were made with wire transfers from bank
16 accounts in New York, a number of them to the extent we had
17 copies with the e-mails with wire reports we attached to
18 Mr. Green's declaration which is a part of our moving papers.

19 Like I mentioned before, the Sonera opinion indicates
20 that selecting the forum based on the presence of assets here
21 and, in fact, the good-faith basis for the belief that the
22 assets are here is an appropriate basis upon which to select
23 the venue.

24 In addition, the AUA has not in its opposing papers
25 provided a substantial basis to claim enforcement would be any

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1 different in Antigua. So, therefore, there is no reason that
2 Antigua is necessarily a more appropriate forum, and again from
3 the Sonera case, the court recognized there can be more than
4 one appropriate forum for the enforcement, but given that we
5 believe there are financial assets here in this jurisdiction,
6 we believe this one is the more appropriate.

7 Finally, I would say with regard to the forum non
8 conveniens argument, the balance of private and public factors
9 weighs in favor of permitting the application.

10 With regard to the motion to dismiss as against
11 Manipal, we would point out -- and much of it is laid out in
12 the brief -- we point out to the court that Manipal was the
13 owner of AUA for a substantial period of time before this
14 contract was entered into, and case law would suggest including
15 the Thompson case, that binding it to the arbitration
16 agreement, a summary proceeding like this could happen. If
17 not, the court could certainly confirm the award with respect
18 to AUA and then proceed separately against Manipal under cases
19 like the Constellation case.

20 THE COURT: Or I could dismiss it as to Manipal and
21 let you sue them, which is what the Second Circuit said I
22 probably ought to do in Orion, right?

23 MS. McMILLAN: I believe that -- I am not sure if
24 Thompson, which came off the top of my head, if Thompson came
25 after Orion. I would imagine that is true, but for the sake of

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1 judicial economy we could proceed on this petition against
2 Manipal in a separate action since everything has already been
3 commenced here.

4 THE COURT: What you're really talking about is doing
5 the government out of a filing fee, right, and giving me the
6 benefit of two lawsuits to deal with instead of one?

7 MS. McMILLAN: I think under the bases of the
8 convention as well as the limited grounds of the FAA provides
9 for vacatur or modification of the award, the court, I don't
10 think there is much basis here to modify or vacate the
11 arbitration award with regard to AUA. That part of the
12 proceeding could be quickly resolved and we would have to
13 address the issue with respect to Manipal.

14 With regard to modification or vacating the award --

15 THE COURT: It could be AUA just pays the award,
16 right?

17 MS. McMILLAN: It could be that AUA pays the award.

18 THE COURT: Then you don't need any separate lawsuit?

19 MS. McMILLAN: This is true. We would like nothing
20 better. With regard to some of the issues that the AUA has
21 raised with respect to the award itself, we would submit that
22 none of these rise to the level of something that requires
23 modification or vacatur of the award.

24 The AUA has claimed the issue of award damages under
25 the bad faith doctrine is something that is not permitted, but

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1 as we all know, the covenant of good faith and fair dealing is
2 applied in any contract, and a breach of that can give rise to
3 damages. Secondly --

4 THE COURT: I don't understand that. In what respect
5 was there a claim here that there was a breach of the covenant
6 of good faith and fair dealing that was in any respect
7 different from the breach of the explicit terms of the
8 contract?

9 MS. McMILLAN: That is a great question, your Honor.

10 I think that the answer is that the arbitrators had
11 the issue of breach of the contract in front of them. There
12 were a panoply of issues that went on on this project that
13 caused problems for the contractor. I think that the
14 arbitrators, taking everything in the whole, saw this was
15 really bad faith and reduced it to a breach of that covenant,
16 and it is permissible.

17 THE COURT: Did they say they reduced it to a breach
18 of that covenant?

19 MS. McMILLAN: They termed it bad faith, the bad faith
20 doctrine.

21 THE COURT: Which boils down to them saying they
22 really didn't like it.

23 MS. McMILLAN: That may well be true.

24 THE COURT: Is it any different from an arbitrator in
25 a dispute over a promissory note, where the claim is that there

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1 was a promissory note and the defendant didn't pay, and the
2 note was for a hundred thousand dollars, saying we are going to
3 give you the hundred thousand dollars on the note, that is the
4 breach of contract, and we are going to give you \$20,000 for
5 bad faith because you really should have paid?

6 Is what they did here any different than that?

7 MS. McMILLAN: I am not sure that it is, your Honor,
8 except that the arbitrator saw the behavior that went on here
9 and believed that this was the AUA acting in bad faith, and the
10 monies that they awarded for that I think were --

11 THE COURT: The problem I am having difficulty with is
12 the concept of bad faith in a context like this. Somebody
13 signs a contract and says I promise to do X in a year in
14 exchange for certain consideration. Then in a year doesn't the
15 party have the right to say to him or herself well, I know I
16 promised to do X, but it is inconvenient, oppressive or
17 whatever, I would rather pay damages?

18 Don't people have that right? Is there any
19 requirement of moral fault in contracts?

20 MS. McMILLAN: I don't know that there is a
21 requirement of moral fault, but there is certainly implied in
22 every contract a covenant of good faith and fair dealing.

23 THE COURT: Would it be true that anybody who fails to
24 pay a bill and who has the money in his checking account and
25 fails to do it is guilty of bad faith and subject to damages

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1 for breach of the implied covenant?

2 MS. McMILLAN: I don't want to make a universal
3 statement, but I think that may well be true. Here certainly
4 the activities rose to the level of bad faith.

5 THE COURT: What activities specifically?

6 MS. McMILLAN: They failed to adhere to the terms of
7 the contract. They refused to issue --

8 THE COURT: Let's stop you right there.

9 In what respect did they fail to adhere to the terms
10 of the contract?

11 MS. McMILLAN: They failed to issue change orders,
12 failed to issue a certificate of substantial completion, they
13 ran afoul of a number of different -- those two jump to mind
14 off the top of my head. They arbitrarily deleted work from the
15 contract after it had been negotiated and then made Leeward --

16 THE COURT: Let's take any one of them.

17 They deleted work from the contract? Is what you're
18 telling me there for the sake of argument, you had a
19 construction contract that said they build a gazebo out behind
20 who knows what, and they were going to pay \$25,000 for the
21 gazebo, and they went into the deal and when construction got
22 underway, they said you know what, forget the gazebo?

23 Is, in principle, is that what you're talking about?

24 MS. McMILLAN: To a degree. It was a much larger
25 scale and it was one of a number of things.

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1 THE COURT: Under ordinary principles of contract
2 where there is a breach of that character, the contractor is
3 entitled to recover. The benefit of the bargain, that is to
4 say, the profit that would have had made had the gazebo been
5 built and paid for and there are consequential and incidental
6 damages?

7 So, for example, if the cancellation came late and the
8 contractor had bought \$10,000 worth of materials and then had
9 to get rid of them somewhere for five, then maybe the
10 contractor has a right to recover the difference in addition to
11 the lost profit, right?

12 MS. McMILLAN: Yes.

13 THE COURT: And the contractor on those facts is made
14 whole by the contractual remedy, right?

15 MS. McMILLAN: Yes.

16 THE COURT: Why on those facts would the other party
17 be obligated to pay anything else?

18 MS. McMILLAN: I think if that, in that instance, if
19 the court found there was a breach of this covenant like these
20 arbitrators did, they could award damages on that basis because
21 of the derelict nature of the activities that happened.

22 THE COURT: What you're really doing is in response to
23 the question of why, you're restating the proposition that I'm
24 asking why about.

25 MS. McMILLAN: I think, your Honor, with respect to

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1 these bad faith damages, I think they were in the nature of
2 compensation because they were part of a larger scheme of
3 damages that the arbitrator has laid out in their decision.

4 THE COURT: In other words, they are entitled -- what
5 the arbitrators did, they awarded a hundred percent of the
6 damage caused by the breach and something else for good measure
7 because they didn't like it?

8 MS. McMILLAN: I don't think it was an additional
9 amount for good measure. As a matter of fact, the award was
10 for substantially less than was originally claimed, but I think
11 the way these arbitrators --

12 THE COURT: If they gave substantially less than
13 originally claimed, isn't the only rational conclusion for me
14 to draw that the amount originally claimed was not
15 substantiated?

16 MS. McMILLAN: No. I think there was -- when Leeward
17 first started out, one of the -- in the amended demand for
18 arbitration, one of the claims was that the contract was a
19 fixed price contract. The arbitrators found that not to be the
20 case, that it was subject to deductions and additions on a
21 measured basis.

22 So I think that not necessarily Leeward --

23 THE COURT: On a measured basis?

24 MS. McMILLAN: Measured basis.

25 THE COURT: What does that mean?

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1 MS. McMILLAN: The work is measured on a monthly basis
2 and converted into a requisition based on amount of work
3 performed in that 30-day period.

4 I think that that's where some of the reduction in the
5 damages came in, the difference between a fixed price contract
6 and a measured works contract. It wasn't that Leeward didn't
7 substantiate their claim; it is the arbitrators disagreed with
8 them on the basis of that contractual point.

9 THE COURT: So they decided to give them a bonus
10 because they disagreed with them on that point?

11 MS. McMILLAN: No, I don't think it was a bonus. They
12 recognized the behavior here was horrendous on the part of the
13 AUA and it was a breach of this covenant and they were entitled
14 to damages as a result of that.

15 THE COURT: What I don't follow is how it is a breach
16 of the covenant at all? I don't get it.

17 MS. McMILLAN: We contend it is a breach of the
18 covenant of good faith and fair dealing because --

19 THE COURT: You really do. That point I've gotten.

20 MS. McMILLAN: -- because the arbitrators termed it as
21 bad faith damages, your Honor, and that must be where it
22 springs from because --

23 THE COURT: Maybe it stems from a view on the part of
24 the arbitrators if they don't like the defendant's conduct and
25 think they weren't acting honorably, they can give more money

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1 for that. They certainly didn't say anything inconsistent with
2 what I just said.

3 MS. McMILLAN: No, except that this panel was a --
4 these are long-standing arbitrators who have done many of these
5 actions before and --

6 THE COURT: So what?

7 MS. McMILLAN: I think they knew what they were doing.

8 THE COURT: That is like saying judges who serve more
9 than 10 years on the Bench can't be reversed.

10 MS. McMILLAN: I would support that, your Honor.

11 THE COURT: I would, too.

12 MS. McMILLAN: With respect to you anyway.

13 I think that this was an intelligent panel that has
14 been doing this a lot, and they recognize that there is this
15 covenant because it is applied in every contract and a breach
16 of contract claim.

17 THE COURT: I believe what it means is that you can't
18 do something that would undermine the benefit of the bargain
19 the other side made. I don't think it means that a judge, jury
20 or arbitrator has the right to award extra damages simply
21 because he didn't like the cut of the defendant's jib.

22 MS. McMILLAN: I think that's what a breach of that
23 covenant equates to, compensatory damages because of the
24 wrongfulness of the conduct.

25 THE COURT: I guess we have a difference of view about

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1 that. At least I think we do.

2 MS. McMILLAN: I am not sure we do. I think that you
3 get compensatory damages for breach of that covenant, and that
4 is what these arbitrators did here.

5 THE COURT: That is not what they said they did, and
6 you have not suggested to me there is any evidence whatsoever
7 in the arbitration record that indicates that the defendant in
8 some way undermined the benefit of the bargain that was in any
9 sense distinguishable from any breach of an explicit term for
10 which the claimant was awarded full damages, in the views of
11 the arbitrators.

12 MS. McMILLAN: I am sorry. Can you read back the
13 first part of that? I am trying to follow you. I don't want
14 to answer you incorrectly.

15 THE COURT: I will work with you, you know?

16 I want to understand it, too. What you have not
17 suggested to me is that the defendant did anything that in any
18 way undermined the bargain that was struck. The defendant
19 allegedly didn't live up to his obligations, but he didn't
20 undermine it so far as what you're telling me, and since the
21 arbitrators gave him a hundred cents on the dollar for whatever
22 damage was caused by the respects in which the defendant did
23 not perform as promised, there is no basis for any bad faith
24 damages.

25 MS. McMILLAN: I think our disagreement is with

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1 whether or not the AUA undermined Leeward's ability to complete
2 the work on the project. That was a constant throughout the
3 project. They were constantly undermining the work.

4 THE COURT: Okay, but suppose, suppose we had a
5 different kind of contract? Leeward goes into a car showroom
6 and says I'll take that Chevy Suburban and I will pay \$75,000
7 for it, rather too much.

8 MS. McMILLAN: I would agree.

9 THE COURT: All right. And the day before he is to
10 pick up the new car and show up with the certified check, he
11 walks in and said, you know, this was a big mistake, I'm not
12 doing it. Now, the car dealer has got an action against him
13 for the difference between \$75,000 and whatever the car dealer
14 can sell the Chevy Suburban for, right?

15 MS. McMILLAN: Yes.

16 THE COURT: Do we agree?

17 MS. McMILLAN: Yes.

18 THE COURT: Does he have a claim for more damages
19 based on the theory that it was a nasty and dishonorable bit of
20 work on the part of the plaintiff to leave the car dealer
21 holding the bag and not to perform on the contract?

22 MS. McMILLAN: If it rises to the level that it
23 breaches that covenant, I would say yes.

24 THE COURT: Well, you're begging the question because
25 what you're saying is that maybe.

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1 MS. McMILLAN: Except here these arbitrators said yes,
2 it did.

3 THE COURT: No, they didn't.

4 Where did they say that?

5 MS. McMILLAN: They said it in the award.

6 THE COURT: Show me exactly where. Which piece of
7 paper in which one of these enormous pile of a thousand pages
8 here I should look at where they said it was a breach of this
9 covenant?

10 MS. McMILLAN: They didn't use the words, "breach of
11 covenant," you're right.

12 THE COURT: They didn't mention any such doctrine.

13 MS. McMILLAN: They said bad faith doctrine.

14 THE COURT: Bad faith doctrine?

15 MS. McMILLAN: Yes.

16 THE COURT: What is the bad faith doctrine?

17 MS. McMILLAN: In the context of breach of contract, a
18 bad faith doctrine is breach of --

19 THE COURT: If it Williston on Contracts or Corbin on
20 Contracts or Restatement on Contracts or Farnsworth on
21 Contracts, or any other treatise you can name and look in the
22 index for bad faith doctrine, I am not going to find it, am I?

23 MS. McMILLAN: No, your Honor, you're not.

24 THE COURT: You made that one up. I am not casting
25 stones. You are doing our best to try to defend what seems to

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1 be a very hard-to-defend position by the arbitrators, and I
2 respect that. That is what it is, right?

3 MS. McMILLAN: It is probably not perfect wording,
4 your Honor, but --

5 THE COURT: I think we can agree on that.

6 Now, is there any basis for it given that it is not
7 perfect wording?

8 MS. McMILLAN: If it is construed as a breach of the
9 covenant --

10 THE COURT: What are the characteristics of the breach
11 of the covenant of good faith and fair dealing?

12 When do you have it and where is it different from a
13 situation where you don't --

14 MS. McMILLAN: It is different where the conduct is so
15 onerous, and throughout the life of the contract, as you had
16 here, it rises to the level not just of a breach, but good
17 faith.

18 THE COURT: What is the difference? What is the
19 difference?

20 MS. McMILLAN: Well --

21 THE COURT: Take my Chevy example. The customer knew
22 he signed to buy that car for 75 grand, he knew it. He was
23 there, he signed it, he thought it was great when he did it,
24 and then he said it was a dumb deal, I am just not going to
25 perform. Is that a bad faith breach?

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1 MS. McMILLAN: If there is an element of
2 intentional --

3 THE COURT: Of course it is intentional. That is the
4 hypothesis.

5 MS. McMILLAN: It may well be then.

6 THE COURT: Well, suppose you go out and you sign a
7 contract to buy a house and you put 10 percent down, and the
8 market, in your perception, moves against you and you decide,
9 you know, I'm going to give up that deposit, but I'm not
10 closing on this, it is way overpriced.

11 Is that a bad faith breach?

12 MS. McMILLAN: In that instance, then your Honor at
13 least in New York State you have the seller has a right of
14 specific performance.

15 THE COURT: Sorry?

16 MS. McMILLAN: Specific performance. It is generally
17 an equitable remedy provided for in real estate contracts where
18 in the absence of a legitimate reason under the real estate
19 contract to not close, it is an equitable claim on which you
20 can basically force closing and title to real estate.

21 THE COURT: Suppose the buyer hasn't got the money?

22 MS. McMILLAN: Generally real estate contracts provide
23 for mortgage contingencies where they're not able to get the
24 money, they can legitimate --

25 THE COURT: Suppose there is no mortgage contingency?

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1 MS. McMILLAN: Then you have a situation where the
2 seller is left with a specific performance claim.

3 THE COURT: Against somebody who can't perform, so
4 what the seller does is court order me to give him this house
5 for half what I agreed to take for it, is that what you're
6 really telling me?

7 MS. McMILLAN: No. I think in a situation like that,
8 the court would have to probably -- I am not sure, to be honest
9 with you. I know the remedy in that situation is specific
10 performance. I have never litigated one of those claims to
11 conclusion where a sale was actually forced upon a purchaser.
12 I know that is the remedy there.

13 THE COURT: You're sure of that?

14 MS. McMILLAN: That is my experience in real estate
15 transactions.

16 THE COURT: A defaulted buyer can get specific
17 performance? A defaulted -- that is to say, a buyer who has a
18 defaulting seller --

19 MS. McMILLAN: Defaulting seller, right.

20 THE COURT: -- can get specific performance?

21 Are you really telling me the seller's remedy is
22 anything other than selling for the best price he can get and
23 suing the buyer for the difference?

24 MS. McMILLAN: No. I think I misheard you the first
25 time. No, the seller probably would retain the down payment

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1 and get a judgment for the difference between the contract and
2 sales price.

3 THE COURT: Right. Can he get more than a judgment
4 for the difference because the buyer deliberately refused to
5 close, in bad faith refused to close? I don't think so.

6 MS. McMILLAN: I am not sure, your Honor.

7 THE COURT: Okay. All right. I think we have
8 explored this piece of this long enough. So let's go on to any
9 other points you want to cover.

10 MS. McMILLAN: I would say, your Honor, with regard to
11 the award for overhead and profit on omitted and floor work
12 that the AUA has raised as a basis for not --

13 THE COURT: Sorry, I couldn't quite make out what you
14 said.

15 MS. McMILLAN: The AUA has referenced in their papers
16 Leeward was not entitled to overhead and profit on omitted and
17 flooring work in the contract. I would say that they've
18 claimed, basically those claims were not a part of the
19 arbitration and were only raised in the closing papers, but I
20 would submit to the court that they were part of the original
21 arbitration because when Leeward first commenced the
22 arbitration, they were seeking relief as a fixed price contract
23 which included overhead and profit on all the work that was
24 contemplated by the contract before the construction project
25 started.

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1 Lastly, the AUA has also raised an issue with respect
2 to the award for change order work. I think that is a very
3 simple call. The AUA claimed Leeward had already been paid for
4 some change orders, but the tribunal, based on the evidence
5 before them, disagreed with the AUA.

6 Lastly, there is a claim that Leeward is not entitled
7 to the interest on late payments as awarded. This, as well as
8 the other issues, were all part of a motion to the tribunal
9 post the initial decision for modification, and the tribunal
10 reaffirmed with regard to these because there is no discernable
11 computational errors in the award.

12 THE COURT: Well, but wait a minute. Did the contract
13 specify the interest rate?

14 MS. McMILLAN: The contract specified the Antiguan
15 legal rate of interest.

16 THE COURT: Which was what?

17 MS. McMILLAN: Believe it or not, it is unclear and
18 can change rather frequently. We had some information that
19 indicated it was 10 percent based on some information that we
20 had gotten from local banks. The AUA suggested it was 5
21 percent, and the arbitrators came down in the middle at 7
22 percent.

23 THE COURT: Okay.

24 MS. McMILLAN: If the court doesn't have any other
25 questions, that is about all we would have for now.

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1 THE COURT: Okay, thank you. Sir?

2 MR. JEMISON: Yes, your Honor.

3 I want to begin my comments, I think logically we
4 should start with what is our threshold motion which is our
5 motion for forum non conveniens, and the key here to this
6 aspect of our motion is that if you look at --

7 THE COURT: You would like to take another year or two
8 before it gets enforced?

9 MR. JEMISON: No, no, no. Leeward is doing, they have
10 come here and said we think that Manipal, who is the hundred
11 percent shareholder of AUA, is the real pocket. They're in New
12 York. We should be allowed to come to New York to enforce an
13 award against AUA, an Antiguan entity. We are an Antiguan
14 entity. Let's come here and --

15 THE COURT: Let's take Manipal out of it altogether
16 for the sake of discussion.

17 MR. JEMISON: Sure.

18 THE COURT: I understand you're two Antiguan entities,
19 but this is a convention case, and why isn't that, for all
20 practical purposes, enough or close to enough to defeat your
21 forum non conveniens motion?

22 MR. JEMISON: There are a few things to look at.

23 First, if you take Manipal out of the case, okay, you
24 have a non-U.S. entity coming to this forum which typically
25 gets little deference. The sole reason that they contend they

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1 should be afforded their deference is this idea they're coming
2 after the assets they think exist here.

3 Again taking Manipal out, Manipal out of the equation,
4 they claim AUA is a shell, they think, and has no assets in
5 Antigua. Why should we have to go there and confirm our award
6 there where we can't collect? It would be a very good argument
7 potentially except that we all know they know that AUA has
8 assets in Antigua. They built it.

9 There is a \$35 million medical school campus that
10 Leeward built.

11 THE COURT: Counsel --

12 MR. JEMISON: The suggestion that AUA is a shell down
13 there --

14 THE COURT: Look, if you like to talk over me, you are
15 welcome to do it, counsel, but it is not helpful.

16 MR. JEMISON: I apologize, your Honor.

17 THE COURT: Who owns the title to that campus? Is
18 that in the record?

19 MR. JEMISON: I don't believe it is in the record. My
20 understanding is it is AUA. I never understood it to be
21 otherwise.

22 THE COURT: What is AUA? I know it is a medical
23 school. Is it a corporation? What is it?

24 MR. JEMISON: It is a corporation incorporated under
25 the Antiguan Barbuda company. We put the articles of

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1 corporation in the --

2 THE COURT: Counsel, you are going so fast, the court
3 reporter can't get it down. I can't understand it.

4 Back up!

5 MR. JEMISON: I'll back up. Thank you, your Honor,
6 and thank you for reminding me. I do have a tendency to speak
7 faster than I should.

8 AUA is an Antiguan Barbuda corporation, Incorporated
9 there under the Companies Act of 1995. We have put into the
10 record at the Sclafani reply affirmation, Exhibit A, a copy of
11 the articles of incorporation. The name of the company is
12 American University of Antigua, Inc.

13 THE COURT: All right. Is there anything in the
14 record that suggests it has no assets whatsoever in the United
15 States?

16 MR. JEMISON: No. My understanding is maybe there is
17 a bank account in the U.S., but they don't do any business
18 here. They're not authorized to do business here, but we
19 didn't say they have assets. We are not making that argument.

20 THE COURT: Let me take a wild guess. The bank
21 account would be in New York, would it?

22 MR. JEMISON: In all honesty, your Honor, I can't
23 answer that question.

24 THE COURT: They advertise for students in the United
25 States?

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1 MR. JEMISON: I believe they likely do.

2 THE COURT: And they have a web site?

3 MR. JEMISON: If they have a web site where it is
4 domainated or registered I can't answer.

5 What I would say is again that they have a services
6 agreement with Manipal which is their owner, an arm's length
7 transaction. We explained this in the Sclafani --

8 THE COURT: Arm's length transaction with their owner?
9 That is a new concept of arm's length transaction.

10 MR. JEMISON: That --

11 THE COURT: Its management is done principally from
12 New York under this contract with Manipal, right?

13 MR. JEMISON: Manipal handles --

14 THE COURT: Is that right?

15 MR. JEMISON: -- Manipal handles the administration.

16 THE COURT: Maybe this isn't your best point,
17 counselor.

18 MR. JEMISON: Okay, I can move on.

19 My second point is let's take, let's -- we'll assume,
20 and as we have discussed, there are assets here in the United
21 States for Leeward to attempt to attach should they have their
22 award confirmed here. It is our position that that is not an
23 issue-dispositive finding.

24 Under the case law of the Second Circuit, first of
25 all, if that were enough, you would never in a situation where

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1 you are coming to a forum because of the assets that may be
2 there, you would never dismiss on forum non conveniens grounds.
3 We know that that is not true because it has happened.

4 It is our position that there are assets in Antigua
5 and that is the more appropriate forum.

6 THE COURT: I thought we were moving on.

7 MR. JEMISON: Okay. Understood. I'll move on quickly
8 to the motion to dismiss Manipal that we've asserted.

9 In the amended petition Leeward has set forth some
10 very basic conclusory allegations as to a reason to pierce the
11 corporate veil. We agree with the comments your Honor made
12 during the prior portion of the argument when Ms. McMillan was
13 arguing that the appropriate thing to do would be to dismiss
14 Manipal, and if they think they have a basis to assert a claim
15 against Manipal to collect on this judgment, Manipal wasn't a
16 party to the arbitration --

17 THE COURT: Let's get to the merits of the award,
18 okay?

19 MR. JEMISON: Sure. As to the merits, your Honor, I
20 don't want to go back into the discussion on the bad faith
21 doctrine. I wholeheartedly agree with your analysis of that
22 issue, and when we got the award --

23 THE COURT: The real problem is not whether you agreed
24 or not with what you presume my analysis to be, but with
25 whether the arbitrators exceeded their proper scope in doing

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1 what they did even if I might disagree with it as a personal
2 matter, taking your assumption for the moment.

3 MR. JEMISON: Yes, your Honor. It is our position
4 that, first, neither party raised an implied covenant claim,
5 any kind of bad faith doctrine claim.

6 THE COURT: What is the bad faith doctrine?

7 MR. JEMISON: I wish I knew, to be perfectly frank. I
8 wish I knew. I don't know where the tribunal got that. I got
9 the same sense and reaction you expressed. Whether it is your
10 view or not remains to be seen. I got the sense from your
11 reaction and your questioning, that is the reaction I had which
12 is they're just wanting to punish or add something on because
13 there was something they didn't like with the way that AUA
14 acted in performing the contract.

15 What I do know is that the primary claim asserted by
16 Leeward was that they were entitled to be paid a fixed price of
17 \$27 million and change in the Eastern Caribbean dollars for
18 this school. The parties had put forward a very detailed
19 schedule of rates for all the different construction tasks that
20 they had planned to do based upon the project designs that
21 existed at the time they entered the contract, how it was
22 supposed to look when it was built.

23 It included, for example, your gazebo. The contract
24 says that that rate, which is basically a function of what they
25 expected it to look like in terms of the size of it times

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1 agreed upon and negotiated unit rates equals the amount per
2 item. That totaled up to \$27 million when you added that
3 measured part of the works with the other parts of the contract
4 including their overhead and the like and having the site set
5 up with scaffolding and rigs and renting all the equipment they
6 needed to be on the site for a year and a half to build the
7 school.

8 What happened was Leeward claimed that was a fixed
9 price contract. It was subject contractually to additions and
10 deductions in the contract. It had to be done by a formal
11 change order in writing signed off by --

12 THE COURT: You're saying the arbitrators concluded it
13 was a fixed price contract?

14 MR. JEMISON: There was never a debate, okay, on
15 either side that this was a fixed price contract. We all
16 agreed on that. There was some -- I think there was
17 terminology difference between the parties that led there to be
18 a belief at one time, one side said saying it was measured
19 versus fixed price.

20 The way it worked, the way we agreed it worked and we
21 argued it worked and the arbitrators ruled that it worked was
22 they had a fixed price. It was built according to spec on day
23 one that is what you pay. You had to build what you said you
24 were going to build.

25 The parties throughout the course of the contract,

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1 construction contract changed the project. The architect
2 decided they wanted to add another window in this room or put a
3 gazebo or take out the gazebo or whatever number of changes
4 there may have been. The way they kept track of payments was
5 through requisitions where they measured every month to see
6 what they paid the prior month and paid progress payments based
7 on exacting measurements the architect and both sides went
8 through. That is how the project worked.

9 The contract said this was supposed to be done, any
10 change by change order, and that is how you document the
11 changes and how you adjust the fixed price, okay?

12 The key defense we won, and the suggestion we largely
13 did not win on this case I do not agree with. The key argument
14 of Leeward was that they were entitled to be paid full rate for
15 what they were supposed to build no matter whether they built
16 it, no matter what. The reason they say that, there were no
17 change orders. Therefore, the contract was as set on day one.

18 We argued that the parties, through their conduct,
19 through this requisition process, mutually waived the formal
20 change order process and did it a different way. We had
21 witness, detailed witness statements from both sides on this
22 issue. We had an individual who was the liaison between the
23 parties when they negotiated the contract on this issue, we had
24 five days of cross-examination at the hearing on this issue.

25 We won on that issue. That was the sole issue. That

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1 was the major issue that we defended. The other big issue in
2 the case was whether or not there should be delay damages, and
3 the arbitrators basically split the baby, finding both parties
4 at fault and awarding them half of what they asked for.

5 There are other claims as well. The reason I am
6 explaining this to you, I understand what the arbitration was
7 and was not about. The two biggest portions of the award we
8 come here to argue about and to seek to be vacated or modified
9 is this bad faith doctrine award which frankly we don't
10 understand where they came from, okay?

11 And this overhead and profit award, when we talk about
12 that, because it wasn't discussed earlier, I want to explain to
13 you my understanding of what was awarded and what happened and
14 hopefully that will help you understand if it is not clear
15 enough from the papers. If it is, tell me and I'll stop.

16 There was a claim for overhead and profit on certain
17 work which we called, for lack of better terms, deleted work.
18 Leeward made a claim during the project that said you took away
19 our job to paint the building and you said we are not going to
20 give that to you because you're not getting this contract done
21 on time and we are going to put it out to bid again.

22 They made a claim under the contract documents to get
23 paid their overhead and profit what they would have earned on
24 that part of the project. It wasn't like the gazebo that
25 wasn't performed. It was something that we gave away to

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1 somebody else, okay?

2 The arbitrators agreed with them on that issue and
3 they awarded them those overhead and profits. We are not here
4 challenging that, okay? What we are challenging is the gazebo.
5 I think it is in the Bush trial submission, so it is in the
6 record, the example I used, I remember using at the hearing was
7 there was this electrical box or area that they were originally
8 designed to build a chain link fence around it for security
9 purposes. At some point when they got to the point of the
10 project where they were going to put up that fence, they asked
11 for request for information. Are we building the fence? There
12 was a unit --

13 THE COURT: You're going too fast against.

14 MR. JEMISON: There was unit rate in the contract for
15 the fence, a dollar amount assigned for the fence they intended
16 to build at the time it went to contract. That was in the
17 contract. That was part of the fixed price, and we said ah, we
18 don't need the fence. We had some other method of security.
19 They decided they didn't want the fence or the architect
20 decided we didn't need to build the fence, Leeward, don't build
21 it. They said okay. They didn't build it.

22 They didn't bill us for it. They never billed us for
23 it. They never asked for overhead and profit they would have
24 earned on building the fence at any time during the project,
25 after the project when they commenced the arbitration, when

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1 they amended their arbitration demand, when they went and
2 submitted witness statements before the arbitration, at any
3 time during the five days of the hearing they never raised that
4 claim.

5 THE COURT: And then they did?

6 MR. JEMISON: Then they did after. We submit that
7 both that and the bad faith doctrine which nobody raised or
8 argued are things in which the arbitrators exceeded their
9 authority and going outside of what was before it.

10 THE COURT: How did they exceed their authority?

11 If you tried this case nonjury or, indeed, for that
12 matter, jury in the United States District Court, you could
13 have completed the whole trial and just before the matter went
14 to the jury or just before the judge was to decide it, and I
15 can even cite you a case where it happened afterward, somebody
16 makes a motion under Rule 15 to conform the pleading to the
17 proof, bang, there's a new claim in the case, you lose. That
18 is the way it works. It can work that way.

19 Why should I conclude the arbitrators did anything
20 wrong if that's in substance what they did?

21 MR. JEMISON: First, the rules that govern the
22 arbitration required you to raise any modifications to your
23 claim before that point in time.

24 THE COURT: Where is that in the mountain of paper?

25 MR. JEMISON: I don't know if the arbitration rules

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1 are in the record, but --

2 THE COURT: They're not in the record.

3 MR. JEMISON: I am trying to answer your question.
4 That would be my first reaction to that question, okay?

5 THE COURT: Rule 8 of the Federal Rule of Civil
6 Procedure says the complaint must contain a short and plain
7 statement of the claim. On my hypothesis to you, it is not in
8 there, it is not in the pretrial order, it it is not in the
9 opening argument. It is not even in the closing argument made,
10 but then somebody moves to conform the pleadings to the proof
11 and you have a new claim, new damages and the plaintiff is home
12 and dry.

13 MR. JEMISON: There is a second place where I can make
14 that argument. It is from the contract itself. The contract
15 itself has a detailed provision how you can raise claims, and
16 you have to raise a claim in the proper manner, timely within a
17 certain period of time after it arose, and then you have to
18 commence an arbitration on the claims that you've asserted and
19 have been rejected either because the architect said no or
20 didn't respond and they didn't do that for this because they
21 never raised it.

22 THE COURT: What is the legal standard that governs
23 the review-ability of the arbitrator's action on this point?

24 MR. JEMISON: The legal standard is that was there a
25 basis for the award.

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1 THE COURT: That can't be right.

2 MR. JEMISON: Did they exceed their authority in -- to
3 be frank, the way I --

4 THE COURT: Did they have authority to decide this
5 case?

6 MR. JEMISON: Yes. This is a due process violation.
7 They didn't give us a possibility to mount a defense.

8 THE COURT: They didn't what?

9 MR. JEMISON: They never provided us with an
10 opportunity to present a defense on this claim. This
11 lesser-included offense, that I guess the analogy I think of it
12 is, they say we asked for everything. They asked for the whole
13 ball of wax. They said you've got to pay us no matter what,
14 that is what the contract says. In the alternative --

15 THE COURT: This was raised in Leeward's post-hearing
16 submission. Is that right?

17 MR. JEMISON: It was.

18 THE COURT: Was it a secret from you?

19 MR. JEMISON: No. We did simultaneous submissions, so
20 we got an opportunity, simultaneous reply. We did submit a
21 reply. We did make the due process argument. The arbitrators
22 didn't agree with us.

23 THE COURT: What is the legal standard that governs my
24 ability to upset that?

25 THE COURT: What do you have to show? There is a

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1 statute here, you know? You don't know? We're here arguing to
2 confirm or upset an arbitration award, and you're telling me
3 you don't know what the legal standard is that governs this
4 matter? I hope you're not telling me that.

5 MR. JEMISON: No, I am not not telling you that. I am
6 having a senior moment.

7 THE COURT: I may have a senior moment. You are not
8 old enough to have a senior moment.

9 MR. JEMISON: I am drawing an analogy. The standard
10 we are moving on is in our papers. I can pull my brief to
11 confirm, refresh my recollection. I am just drawing a blank at
12 the moment.

13 THE COURT: Okay.

14 (Pause)

15 MR. JEMISON: It is under Section 10 of Article IX of
16 the FAA.

17 THE COURT: That governs here through the convention?

18 MR. JEMISON: Yes.

19 THE COURT: Okay.

20 MR. JEMISON: Both parties agree Section 10 applies
21 here because the award was made within the United States
22 because of the Puerto Rican venue --

23 THE COURT: Okay. So?

24 MR. JEMISON: -- where the arbitrators were guilty of,
25 among other things, any misbehavior by which the parties, any

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1 party have been prejudiced.

2 THE COURT: Are you equating misbehavior with error?

3 MR. JEMISON: I am equating misbehavior with
4 adjudicating and allowing Leeward to present a claim that was
5 never asserted during the arbitration hearing.

6 THE COURT: Do you have any authority whatsoever that
7 supports the view that that constitutes misbehavior?

8 MR. JEMISON: We did not find a direct case on point,
9 no.

10 THE COURT: Did you find anything that is even
11 analogically on point?

12 MR. JEMISON: No, your Honor.

13 THE COURT: Okay. So I have to indulge all reasonable
14 presumptions in favor of the validity of the award, don't I?

15 MR. JEMISON: You do. I understand.

16 THE COURT: Let's move on. Is there anything else?

17 MR. JEMISON: I discussed the bad faith doctrine
18 already.

19 With respect to the other matters, the change order
20 provision and the miscalculation, on the change order
21 provision, our objection to that portion of the award -- and we
22 understand that your Honor cannot substitute its own views as
23 to whether or not the evidence supported the award of the
24 tribunal or not -- our view is that the rules governing the
25 process required a reasoned award, and we think simply stating

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1 that the evidence supported their claim is not a reasoned
2 award. It is hard for me to understand how they reach that
3 conclusion since they didn't tell me. I frankly don't agree
4 with their conclusion, but obviously that is not something I
5 can bring to your Honor.

6 The basis of that, again I don't have any authority
7 under the FAA where the failure to provide a reasoned award per
8 se is something that would be one of the factors we believe
9 could be argued that way. I don't have authority to
10 specifically support me. Again it is an argument that we think
11 that we have made. Again I don't have a case for you.

12 The final piece of it on the mathematical issue, and
13 just to explain it if necessary, the decision on this, it is a
14 minor amount of money, a minor point. The decision is
15 inherently inconsistent. There was a number of payments that
16 they found sufficient evidence to show that they were not paid
17 timely. Whether you agree with them or not is not material to
18 this proceeding. However, the Mada finding within the post,
19 within their decision that one of the payments -- two of
20 them -- the largest part of them was this idea, thing for
21 mobilization which were advances that they said we didn't pay
22 them.

23 The tribunal agreed with us, the evidence we produced
24 at the hearing, that mobilization, those payments and that
25 dispute had been settled by the parties long before we got to

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1 arbitration in the context of the construction project.

2 The petitioner's, Leeward's post-trial findings of
3 fact and conclusions of law, when they set forth every single
4 late payment they think was made and when it was made and what
5 interest should be awarded on it at the rate they thought
6 should be applied, and they chose 10 percent, they included all
7 those two mobilization payments which were the large majority
8 of the late fees in terms of dollar amounts when you add up the
9 numbers, so the court in one instance says that was already
10 settled, and the other breath they made it --

11 THE COURT: Sorry. I just lost all of that. It is
12 just a stream of sound.

13 MR. JEMISON: Sure. When the arbitrators, when
14 Leeward submitted their post-trial findings of fact and
15 conclusions of law, they put in every single payment they
16 believed was late including these two larger payments for
17 mobilization which has been advanced. During the construction
18 project there was a dispute over the payment of mobilization.

19 THE COURT: And they settled the mobilization.

20 MR. JEMISON: They settled the dispute.

21 The arbitrators agreed with us they settled the
22 dispute. They said so in the final award. Then when they
23 calculated the interest, they didn't back out those line items,
24 the way we read the award. What they did was they reduced the
25 total amount of interest that Leeward sought at 10 percent rate

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1 and reduced it to 7 percent. When they did that, I think they
2 forgot, the way I read it, they didn't remove the mobilization
3 portion of that claim.

4 THE COURT: What was the amount they awarded for the
5 interest in total?

6 MR. JEMISON: Roughly, I think it totals 60-something
7 thousand.

8 THE COURT: What would it have been if they had given
9 10 percent and backed out the mobilization payments?

10 MR. JEMISON: Give me a moment. I don't have the
11 numbers off the top of my head. I know it is in our papers.

12 Had they backed it off -- well, I don't know what the
13 number would be offhand at 10 percent, but had they backed it
14 it out properly at 7 percent, it would have been the 17,000 and
15 not the 44,000 they awarded. You have to run the math. I am
16 sorry, I don't have it on me. Do you have it?

17 (Off-the-record discussion)

18 MR. JEMISON: Do you have it Katherine?

19 Leeward's original ask was for 63,000 in interest.

20 THE COURT: And that assumes what rate?

21 MR. JEMISON: At 10 percent. Had the tribunal backed
22 out --

23 THE COURT: If they backed out the mobilization, would
24 it have been at 10 percent?

25 MR. JEMISON: Yes.

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1 THE COURT: If they backed out the mobilization, what
2 would it have been at 10 percent?

3 MR. JEMISON: 24,504.

4 THE COURT: And they gave you, at 7 percent, they gave
5 you a total of what?

6 MR. JEMISON: They charged us 44,000 because that
7 included the mobilization. Had they backed it out, it would
8 have been 17. The math on this, I knew it was in here, is in
9 our modification application. That is in the record.

10 THE COURT: I take it the interest rate was
11 controverted item at the arbitration. Is that right?

12 MR. JEMISON: It wasn't raised in the arbitration.

13 In post-trial papers Leeward took the position what
14 the contract should mean is the legal rate, the bank rate in
15 Antigua which is a fluctuating rate at or around 10 percent.
16 We had submitted authority, and I don't recall off the top of
17 my head right now, but from the Eastern Caribbean states, the
18 legal rate of interest typically means the judgment rate, 5
19 percent. We argued the contract should be read, construed to
20 mean the judgment rate because the parties weren't any more
21 clear than that. Leeward argued for the 10 percent. The
22 arbitrator decided to make 7. I don't know how they got there.

23 THE COURT: And maybe it was just a means of giving
24 you the economic benefit of an adjustment for backing out the
25 mobilization without actually being very careful about how the

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1 figures appeared in the award, right? I mean they really kind
2 of split the difference.

3 MR. JEMISON: I think they split the difference on the
4 rate. I don't think they were intending to do what you
5 suggest, which is to use the 7 percent rate to somehow fix the
6 math because even if that's what they intended, we made it very
7 clear in our modification motion that they got the math wrong,
8 and they just didn't seem to care.

9 THE COURT: Maybe --

10 MR. JEMISON: They didn't explain why.

11 THE COURT: -- maybe they didn't care because what
12 they were trying to do was cut the baby in half in view of both
13 substitutes over the interest rate and over the mobilization.

14 MR. JEMISON: But then the way I look at it, why
15 specifically say that the mobilization claim was settled?

16 THE COURT: I understand. You know, Judge Friendly
17 said what people are entitled to is a fair trial, not a perfect
18 trial.

19 MR. JEMISON: Agreed.

20 THE COURT: Anything else?

21 MR. JEMISON: No, your Honor, unless you have any
22 specific questions of me.

23 THE COURT: No. Thank you. Anything else?

24 MS. McMILLAN: If I can have a moment?

25 THE COURT: I should have called on Ms. Lieb here

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1 because she is representing the principal defendant.

2 MS. LIEB: Your Honor, I just have one point.

3 THE COURT: Mr. Jemison, after all, is only
4 representing the party he says shouldn't even have been sued
5 here. The award isn't even against his client.

6 MR. JEMISON: No, your Honor, I represent both, both
7 defendants, as is Ms. Lieb.

8 THE COURT: You represent both?

9 MR. JEMISON: Yes. If that was unclear, I apologize.
10 I represent AUA. I actually was one of the two attorneys that
11 tried the matter down in Puerto Rico.

12 MS. LIEB: You asked earlier if there was anything in
13 the record about AUA's ownership of the campus in Antigua, and
14 there is in Paragraphs 9 and 10 of the reply declaration of
15 Leonard Sclafani. It goes into AUA's ownership of the campus
16 as well as other property in Antigua.

17 THE COURT: Okay. Thank you.

18 Okay, Ms. McMillan, anything else?

19 MS. McMILLAN: Just briefly, your Honor.

20 Just quickly, your Honor, I just wanted to briefly
21 respond to some things Mr. Jemison said with regard to the
22 overhead and profit on the omitted work and that not being a
23 part of the claim. Leeward has always maintained that is part
24 of the claim. In fact, as far back as May of 2009 there was
25 project correspondence discussing overhead and profit for

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1 omitted and deleted work.

2 THE COURT: It doesn't matter what there was long
3 before the arbitration. The question from his point of view
4 was what was in your statement of claim.

5 MS. McMILLAN: We submit both the original statement
6 and the amended demand for arbitration included overhead and
7 profit on omitted work because --

8 THE COURT: Where would I find that?

9 MS. McMILLAN: It is part of the overall contract
10 amount that was originally claimed as a fixed price contract.
11 It was included in the 27 million.

12 THE COURT: There is something fundamentally different
13 between -- in other words, there is no separately identified
14 claim for that, is that right, until the very end of the
15 arbitration?

16 MS. McMILLAN: It was based on what transpired at the
17 hearings. It was separated out later in the proceedings.

18 THE COURT: The answer to my question was "yes"?

19 MS. McMILLAN: Yes.

20 THE COURT: Thank you.

21 I would have loved to have ruled on this from the
22 Bench today. In two respects, I am going to. It is dismissed
23 as against Manipal. In O'Ryan Shipping, the Second Circuit
24 made it abundantly clear that an action for confirmation is not
25 the proper time for a district court to pierce the corporate

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1 veil. I think that applies here.

2 That, of course, is without prejudice to an action by
3 Leeward against Manipal, and I am going to deny forum non
4 conveniens dismissal. This is a convention case. That might
5 even conceivably be enough to warrant denial of forum non
6 conveniens dismissal, but there is more here.

7 AUA has assets here against which Leeward wishes to
8 enforce. That surely is enough. The public and private
9 interest factors are sufficient to support the case for many
10 years. Leeward is entitled to not too great deference with
11 respect to its choice of forum, but in the Second Circuit there
12 is a sliding scale of deference, and they're entitled to enough
13 deference given all of the other circumstances here to require,
14 in my view, denial of forum non conveniens dismissal.

15 That leaves us with the question of whether there is
16 any basis to tinker with the award. As to that, I am going to
17 reserve decision. I think counsel is well aware of my concern
18 with respect to the bad faith damages. I want to give a little
19 more thought to the interest calculation point, although it
20 doesn't amount to a hill of beans in the overall scope of
21 things, and beyond that I will not offer any comments.

22 I will note this: By my rough estimate, the motion
23 papers on this matter are about, I am just guessing from the
24 thickness, 1200 or 1300 pages long. The whole amount in
25 controversy is a million dollars, plus or minus. I can't begin

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1 to imagine why this case hasn't been settled. It clearly ought
2 to be, and I will not have a decision for you before the end of
3 2012, and in the holiday spirit, I hope you all talk to your
4 principals and tell them it may not be a home run for anybody
5 and get this thing resolved.

6 Okay. Thank you very much.

7 (Court adjourned)